

FILED

13 NOV 13 AM 10:57

OKL

DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALVARO LOPEZ-MAGANA,
Defendant-Petitioner,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Respondent.

Civil Case No.: 10-cv-2265-BEN
Criminal Case No.: 09-cr-4298-BEN

**ORDER DENYING MOTION TO
VACATE, SET ASIDE, OR
CORRECT SENTENCE UNDER 28
U.S.C. § 2255.**

[Docket No. 30]

Before this Court is a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to § 2255 filed by Petitioner Alvaro Lopez-Magana. (Docket No. 30). For the reasons stated below, the Motion is **DENIED**.

BACKGROUND

As set forth in the Criminal Complaint in this matter, Petitioner Alvaro Lopez-Magana and another individual were stopped by a U.S. Border Patrol agent on October 29, 2009 after the Border Patrol received a report of possible illegal aliens walking along Live Oak Springs Road. (Exh.¹ 4 at 2). Both admitted to being citizens and nationals of Mexico illegally present in the United States, and were arrested. (*Id.*). Routine record checks revealed that Petitioner had previously been deported to Mexico on December 22, 2008, and that Petitioner had not applied

¹The only exhibits in this matter were filed with the Government's Response. (Docket No. 37). All references to exhibits in this Order should be understood as referring to that Response.

1 for permission to return to the United States. (*Id.*). On December 21, 2009, the
2 United States filed a Superseding Information charging Petitioner with one count of
3 misdemeanor illegal entry in violation of 8 U.S.C. § 1325, and one count of felony
4 illegal entry in violation of 8 U.S.C. § 1325. (Exh. 6).

5 Petitioner entered into a plea agreement with the United States on December
6 21, 2009. (Exh. 7). The final page of the agreement bears Petitioner's signature,
7 and he initialed the other pages of the agreement. (*Id.*). The plea agreement stated
8 both of the charges and their maximum penalties. (*Id.* at ¶ 2). The agreement stated
9 that in signing the agreement, Petitioner represented that he had full opportunity to
10 discuss the facts and circumstances of the case with defense counsel, and "has a
11 clear understanding of the charges and the consequences of this plea." (*Id.* at ¶
12 2(b)(1)). Petitioner admitted to certain facts in his plea, including the fact that he
13 had previously been deported after an aggravated felony conviction for conspiracy
14 to distribute a controlled substance, and acknowledged that his prior conviction
15 resulted in a 16-level increase in his offense level. (*Id.* at ¶ 4).

16 The agreement also included a broad waiver of his right to seek appellate
17 review or collaterally attack his plea, conviction, or sentence. Paragraph 12 of the
18 Agreement stated that he agreed that he:

19 waives to the full extent of the law, any right to appeal or collaterally
20 attack the guilty plea, conviction and sentence, including any
21 restitution order, unless the Court imposes a custodial sentence greater
22 than the high end of the guideline range recommended by the
23 Government pursuant to this agreement at the time of sentencing or the
24 statutory mandatory minimum term, if applicable.

25 (*Id.* at ¶ 12).

26 Finally, the agreement states, immediately above the signature lines, that by
27 signing the agreement, Petitioner certified that he read the agreement (or had it read
28 to him in his native language), discussed its terms with defense counsel, and "fully
understood] its meaning and effect." (*Id.* at ¶ 15). It further stated that Petitioner
was satisfied with the representation received. (*Id.*).

Petitioner entered a guilty plea on December 21, 2009, before Magistrate

1 Judge Barbara Lynn Major. (Exh. 8). At the hearing, he stated that he had signed
2 the plea agreement after it was read to him in Spanish, that he had discussed the
3 document with his attorney, and that the lawyer explained the document and
4 answered any questions. (*Id.* at 13). He also stated that he had discussed the
5 sentencing guidelines and their applicability with counsel. (*Id.* at 12-13). The
6 Magistrate asked Petitioner about the provision of the plea agreement waiving his
7 right to appeal and right to collateral attack. (*Id.* at 14). She ensured he had
8 discussed the provision with his attorney, and advised him that he was waiving his
9 rights to appeal or collaterally attack the plea, conviction, or sentence, to the full
10 extent of the law. (*Id.* at 14). Petitioner stated that he understood that provision and
11 agreed to be bound by the waiver. (*Id.*). He stated he was satisfied with the advice
12 he received from his attorney, and his attorney affirmed he had gone over the
13 agreement with Petitioner and believed that Petitioner understood the agreement.
14 (*Id.* at 13-15). The Magistrate made explicit findings and recommendations that the
15 guilty plea was made “knowingly and voluntarily with the full understanding of the
16 nature of the charge, the rights that you have and are giving up, and all of the other
17 consequences of your guilty plea.” (*Id.* at 19).

18 At the sentencing hearing on February 8, 2010, this Court confirmed with
19 Petitioner and his counsel that Petitioner had waived and given up his right to
20 appeal or collaterally attack his plea, his conviction, and his sentence. (Exh. 12 at
21 7-8). This Court sentenced Petitioner to 6 months of confinement for the
22 misdemeanor illegal entry, 24 months of consecutive confinement for the felony
23 illegal entry, and one year of supervised release. (Exh. 12 at 6; Docket No. 28).

24 On November 1, 2010, Petitioner filed a Motion to Vacate, Set Aside, or
25 Correct Sentence Pursuant to § 2255. Petitioner asserted six grounds for relief: (1)
26 the Court failed to comply with Federal Rule of Criminal Procedure 11; (2) the
27 sentence was greater than necessary to meet the sentencing goals of § 3553(a), (3)
28 he unknowingly and involuntarily waived his right to appeal; (4) his ineligibility for

1 certain BOP benefits should have been considered in sentencing, and resulted in an
 2 Equal Protection violation; (5) his sentence is unreasonable due to an improper
 3 increase of his base-offense level as a result of his prior conviction; and (6) that he
 4 does not have an “aggravated felony prior conviction.” In the case of each ground,
 5 he indicated that he did not pursue a direct appeal or any post-conviction motion,
 6 petition, or application. (Mtn. at 5-14). The Government filed a Response on June
 7 3, 2011. (Docket No. 37). Petitioner did not file a Traverse.

8 **LEGAL STANDARD**

9 A district court may “vacate, set aside or correct” the sentence of a federal
 10 prisoner that was 1) imposed in violation of the Constitution or law of the United
 11 States, 2) where the court lacked jurisdiction to impose the sentence, 3) where the
 12 sentence was in excess of the maximum authorized by law, or 4) where the sentence
 13 is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). A district court must
 14 hold an evidentiary hearing before denying a § 2255 motion, unless it is
 15 conclusively shown that the prisoner is entitled to no relief. 28 U.S.C. § 2255(b).
 16 However, if it is clear the petitioner has failed to state a claim, or has “no more than
 17 conclusory allegations, unsupported by facts and refuted by the record,” a district
 18 court may deny a § 2255 motion without an evidentiary hearing. *United States v.*
 19 *Quan*, 789 F.2d 711, 715 (9th Cir. 1986).

20 **DISCUSSION**

21 A. Petitioner Waived His Right to Appeal or Collaterally Attack His 22 Sentence

23 As part of the plea agreement, Petitioner waived his right to appeal and
 24 collaterally attack his sentence. (Exh. 7 at ¶ 15; Exh. 12 at 7-8). The Ninth Circuit
 25 has upheld the validity of waivers of the right to appeal and collateral attack.
 26 *United States v. Navarro-Botello*, 912 F.2d 318, 321-22 (9th Cir. 1990), *cert denied*,
 27 503 U.S. 942 (1992) (upholding a waiver of the right to appeal); *United States v.*
 28 *Abarca*, 985 F.2d 1012, 1014 (9th Cir.), *cert .denied*, 508 U.S. 979 (1993)

1 (upholding a waiver of the right to a collateral attack under § 2255). The rights of
2 direct appeal and collateral attack in a criminal case are purely statutory. *Id.*

3 A waiver of the right to direct appeal and collateral attack will be upheld
4 where it was “knowing and voluntary.” *Id.* A knowing and voluntary waiver of
5 appellate rights is enforceable where the language of the waiver encompasses the
6 right to appeal on the grounds raised. *See United States v. Rahman*, 642 F.3d 1257,
7 1259 (9th Cir. 2011) (citation omitted). The same standard has explicitly been
8 applied to waiver of collateral attacks. *Patterson-Romo v. United States*, No. 10-cr-
9 3319, No. 12-cv-1343, 2012 WL 2060872, at *1 (S.D. Cal. June 7, 2012).

10 However, the Ninth Circuit has declined to hold that a waiver categorically
11 forecloses a defendant from bringing any § 2255 proceeding, such as a claim of
12 ineffective assistance of counsel or involuntariness of the waiver. *Abarca*, 985 F.2d
13 at 1014.

14 i. Knowing and Voluntary

15 The waiver of a right to appeal is knowing and voluntary if the plea
16 agreement as a whole was knowing and voluntary. *United States v. Jeronimo*, 398
17 F.3d 1149, 1154 (9th Cir. 2005) (overruled on other grounds). A waiver will be
18 considered knowing and voluntary where the plea colloquy satisfies Rule 11, and
19 the record reveals no misrepresentation or gross mischaracterization by counsel that
20 tainted the plea. *United States v. Sepulveda-Iribar*, 197 Fed. Appx. 592, 592 (9th
21 Cir. 2006) (citing *Jeronimo*, 398 F.3d at 1157 n.5). After a careful review of the
22 written plea agreement, the Rule 11 plea colloquy, and the entire record in this
23 matter, this Court finds that the plea and the waiver were knowing and voluntary.

24 As discussed above, Petitioner signed the last page of the plea agreement, and
25 initialed the other pages. (Exh. 7). He indicated that he had read and fully
26 understood it, and was satisfied with the representation of his attorney. (*Id.* at ¶ 15).

27 Review of the transcript reveals that the Magistrate complied with the
28 requirements of Rule 11 of the Federal Rules of Criminal Procedure. The hearing

1 transcript clearly refutes Petitioner's claim that Rule 11 was not followed.
 2 Petitioner claims that he was not advised of his rights, but the Magistrate clearly
 3 detailed the rights Petitioner was giving up, including those specified in Rule 11.
 4 FED. R. CRIM. P. 11(b)(1); (Exh. 8 at 7-10). Petitioner claims that the Magistrate
 5 failed to assure that his plea was knowing and voluntary "(by inter, alia, accurately
 6 informing him of the full range of punishment to which he was exposed)." (Mtn. at
 7 5). The transcript reveals that the Magistrate informed him of the charges and the
 8 possible punishments, and Petitioner stated that he understood. (Exh. 8 at 9-11).
 9 He also claims the Magistrate failed to assure an adequate factual basis for the plea.
 10 (Mtn. at 5). However, the Magistrate specifically asked Petitioner about the details
 11 of the crime he had allegedly committed, and Petitioner admitted to all of the
 12 necessary elements. (Exh. 8 at 16-18).

13 The Magistrate also ascertained that Petitioner was satisfied with the advice
 14 of his counsel. (*Id.* at 13-14). The Magistrate specifically discussed the waiver of
 15 the right to appeal and collateral attack with Petitioner, and Petitioner represented to
 16 the Magistrate that he understood this, and agreed to be bound by the waiver. (*Id.* at
 17 14-15). The Magistrate specifically found that the guilty plea was knowing and
 18 voluntary. (*Id.* at 18-19).

19 The Court notes that, in the course of the Rule 11 discussion, Petitioner also
 20 references a "breach" of the plea agreement. (Mtn. at 5). This is a conclusory
 21 allegation, with no supporting facts in the record, and he fails to make any
 22 connection between Rule 11 and any breach of the plea agreement.

23 Since the Rule 11 colloquy was proper, the waiver will be considered proper
 24 if there is no misrepresentation or gross mischaracterization by counsel. *See*
 25 *Sepulveda-Iribe*, 197 Fed. Appx. at 592. No misrepresentation or
 26 mischaracterization has been alleged. Petitioner does state in Ground Three that:
 27 "substantial issues for review are presented by this Court, colorable basis extends to
 28 attack the sentence, based on conviction obtained by plea of guilty which was

1 unlawfully induced or not made voluntarily or with understanding of the nature of
2 the charges and the consequences of the plea.” (Mtn. at 8). It is not clear to this
3 Court that Petitioner is arguing that his plea was actually “unlawfully induced,”
4 rather than the fact that such an inducement might be grounds to attack a sentence,
5 much like a challenge to knowledge or voluntariness. To the extent Petitioner is
6 referring to something beyond what appears in his motion, Petitioner must present it
7 to the Court. A bare, conclusory allegation will not suffice. However, this Court
8 notes that he affirmed to the Magistrate that he was not threatened, that he was not
9 pleading guilty to help another and that, outside the plea agreement, no promises
10 were made to him by anyone to get him to plead guilty. (Exh. 8 at 15).

11 Additionally, this Court notes that Petitioner stated that “the government has
12 failed to express its intent to enforce this waiver.” (Mtn. at 8). It is unclear to this
13 Court what Petitioner is attempting to allege. However, the Government clearly
14 included the waiver in the agreement, and there has been no occasion known to this
15 Court where the Government might be required to inform Petitioner that it would
16 enforce the waiver.

17 After full consideration of the briefing and the record in this matter, this
18 Court concludes that the waiver of appellate and collateral attack statutory rights
19 was knowing and voluntary.

20 This Court also notes that because there was no violation of Rule 11, Ground
21 One of the Petition is necessarily denied on the merits. (Mtn. at 5). Ground Three,
22 which alleges an unknowing and involuntary waiver of appellate rights, must also
23 fail on the merits. (*Id.* at 8).

24 ii. Scope of the Waiver

25 Petitioner’s claims will only be waived if they come within the scope of the
26 provision. Plea agreements are contractual in nature and are measured by
27 contractual standards. *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir.), *cert.*
28 *denied*, 531 U.S. 1057 (2000). In interpreting a plea agreement, a court looks to

1 what the parties reasonably understood to be the terms of the agreement. *See United*
 2 *States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (citation omitted).

3 The plea agreement in this case specifically provides that Petitioner waived
 4 "to the full extent of the law, any right to appeal or collaterally attack the guilty
 5 plea, conviction, and sentence," unless this Court imposed a sentence in excess of
 6 the high end of the guideline range based on the offense level recommended by the
 7 Government in the plea agreement. (*See* Exh. 7 at ¶ 12). This Court sentenced
 8 Petitioner to 30 months of confinement, below the recommended guideline range of
 9 46-57 months. (Exhs. 9, 10, 12 at 6).

10 The language of the plea agreement is broad and explicitly covers Petitioner's
 11 sentence. It is thus properly read to cover Ground Two (the reasonableness of the
 12 sentence under § 3553), Ground Four (failure of the court to consider ineligibility
 13 for programs and pre-release custody as mitigating factor), Ground Five (sentence
 14 unreasonable under § 3553 because sentencing guideline produced unreasonably
 15 high range, the court failed to consider mitigating circumstances of prior conviction,
 16 and the court emphasized his full involvement), and Ground Six (court incorrectly
 17 found he had a prior aggravated felony). A narrower interpretation would render
 18 the waiver meaningless.

19 Similarly, the waiver covers an attack on the plea. This court has already
 20 concluded that the plea was knowing and voluntary. To the extent that Ground One
 21 might be read to assert other problems with the plea, such as a challenge to the
 22 finding of factual support for the plea, this would be covered by the waiver.

23 **B. Failure to Directly Appeal**

24 Additionally, Petitioner cannot raise issues in a § 2255 motion that he could
 25 have raised on appeal. *See United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir.
 26 1994); *Reed v. Farley*, 512 U.S. 339, 354 (1994). Petitioner did not directly appeal
 27 any aspect of his sentence or conviction. A claim not raised on direct appeal
 28 generally may only be raised on collateral review if the petitioner shows 1) cause

1 and 2) prejudice. *See Massaro v. United States*, 538 U.S. 500, 504 (2003).

2 Petitioner could have raised his asserted grounds on appeal. To the extent
3 Petitioner had any valid basis for challenging his waiver of appellate rights, he
4 could have raised such an issue on his direct appeal. *See, e.g., United States v.*
5 *Joyce*, 357 F.3d 921, 922 (9th Cir. 2004).

6 C. Failure to Establish Ineffective Assistance of Counsel as Excuse for
7 Failure to Directly Appeal

8 Petitioner's only explanation for his failure to assert his claims on direct
9 appeal is a repeated claim of "Ineffective assistance of counsel (failure to file notice
10 to appeal timely)." (E.g. Mtn. at 13). Petitioner does not assert ineffective
11 assistance of counsel as a separate ground for relief. Petitioner cites ineffective
12 assistance of counsel only to explain why he did not file an appeal as to Grounds
13 Two through Six, and this Court presumes for this discussion that Petitioner also
14 intended to state the same explanation as to Ground One. Petitioner also stated that
15 "Due to that there was not a direct appeal proceedings, because of the ineffective
16 assistance of counsel during pre-trial proceedings." (*Id.* at 14).

17 Ineffective assistance of counsel may constitute "cause" in excusing a
18 defendant's failure to raise other issues. *United States v. Withers*, 638 F.3d 1055,
19 1064-65 (9th Cir. 2010). To constitute "cause," attorney error must meet the
20 "ineffective assistance of counsel" constitutional standard. *See id; Moorman v.*
21 *Schriro*, 426 F.3d 1044, 1058-59 (9th Cir. 2005). An ineffective assistance of
22 counsel claim must demonstrate that (1) defense counsel's performance was
23 deficient; and (2) this deficient performance prejudiced his defense. *Strickland v.*
24 *Washington*, 466 U.S. 668, 690-92 (1994). Petitioner's claim does not meet this
25 test.²

27 _____
28 ²As this Court concludes that ineffective assistance of counsel has not been
demonstrated under the constitutional standard, Petitioner would not be able to prevail
upon a separate ineffective assistance of counsel claim, even if this Court very liberally
construed the Motion to include such a claim.

1 Petitioner claims “ineffective assistance” and a failure to file in a timely
 2 fashion, but provides no argument that the failure to file was deficient. Petitioner
 3 must show that his counsel’s representation “fell below an objective standard of
 4 reasonableness.” *Strickland*, 466 U.S. at 687-688. Because of the difficulties
 5 inherent in evaluating the performance of counsel after the fact, a court must
 6 indulge a strong presumption that counsel’s conduct falls within the wide range of
 7 reasonable professional assistance. *Id.* at 689.

8 In the case at hand, it is undisputed that no notice of appeal was filed.
 9 However, the plea agreement included a broad waiver of the right of direct appeal.
 10 As noted above, that waiver was valid and covered the issues Petitioner seeks to
 11 raise. On the basis of the facts alleged by Petitioner, counsel’s decision appears to
 12 be within the bounds of reasonable professional assistance. Without more, this
 13 Court cannot conclude that counsel was deficient in failing to pursue an appeal.
 14 Petitioner must provide this Court with some basis beyond conclusory allegations to
 15 conclude that counsel’s failure was deficient.

16 Additionally, if a defendant cannot demonstrate that, but for counsel’s
 17 deficient performance, he would have appealed, counsel’s deficient performance has
 18 not deprived him of anything, and he is not entitled to relief. *Roe v. Flores-Ortega*,
 19 528 U.S. 470, 484 (2000). Petitioner must demonstrate that there is a “reasonable
 20 probability that, but for counsel’s deficient failure, he would have timely appealed.”
 21 *Id.* Here, however, Petitioner fails to demonstrate prejudice, as he does not even
 22 allege that he asked his counsel to file an appeal, or provide any basis from which
 23 this Court can conclude that he would have filed, but for counsel’s incompetence.
 24 *Cf. Manning v. Foster*, 224 F.3d 1129, 1135-36 (9th Cir. 2005) (finding prejudice
 25 where the petitioner demonstrated that “but for” his attorney’s errors he would have
 26 appealed by showing that he informed his attorney of his desire to appeal by phone
 27 and in a letter).

28 Although there was one reference to “pre-trial” incompetence, Petitioner did

1 not point to any particular action or inaction by counsel that was allegedly
 2 incompetent. Petitioner must identify the acts or omissions that are alleged not to
 3 have been the result of reasonable professional judgment; a bare, conclusory
 4 allegation will not suffice. *See Strickland*, 466 U.S. at 690.

5 Petitioner has not properly alleged ineffective assistance of counsel as an
 6 excuse. As such, his claims are procedurally defaulted because of Petitioner's
 7 unexcused failure to directly appeal.

8 D. Equal Protection Claim

9 Petitioner also claims that the disparate sentences between alien and
 10 American inmates because of immigration detainees is a violation of the Equal
 11 Protection Clause. (Ground Four). Petitioner primarily appears to be contending
 12 that this Court failed to consider how his alien status and ineligibility for certain
 13 programs would affect his sentence. This challenge has been waived, and otherwise
 14 should have been raised on direct appeal, as stated above. However, to the extent
 15 that Petitioner also seeks to challenge the manner, location, or conditions of the
 16 sentence's execution, such claims generally must be brought pursuant to 28 U.S.C.
 17 § 2241. *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000).

18 E. Evidentiary Hearing

19 Unless the motion and the records of a case conclusively show that the
 20 prisoner is entitled to no relief, a court is required to grant a prompt hearing to
 21 determine the issues and make findings of fact and law with respect thereto. 28
 22 U.S.C. § 2255(b). However, where the record demonstrates that a petitioner has
 23 failed to state a claim, or asserts allegations that are so frivolous or incredible as to
 24 warrant summary dismissal, a district court may deny a § 2255 motion without an
 25 evidentiary hearing. *Quan*, 789 F.2d at 715. Where a petitioner has asserted "no
 26 more than conclusory allegations, unsupported by facts and refuted by the record,"
 27 no hearing is required. *Id.*

28 In the case at hand, this Court has determined Petitioner's claims all clearly

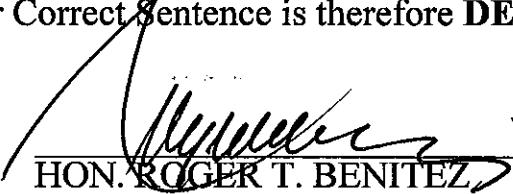
1 fail on the merits, or are covered by the waiver. Alternatively, Petitioner failed to
2 raise the issues on direct appeal, and has provided this Court with no excuse for
3 failing to do so beyond conclusory and unsupported assertions of ineffective
4 assistance of counsel. As such, this Court determines that Petitioner is entitled to no
5 relief, and no evidentiary hearing is required.

6 **CONCLUSION**

7 Upon a full review of the briefing and the record, this Court concludes that
8 there was a proper Rule 11 colloquy. In the plea agreement, during the Rule 11
9 colloquy, and at sentencing, Petitioner made a knowing and voluntary waiver of his
10 statutory rights to appeal and collateral attack. Grounds One and Three therefore
11 fail on the merits. The scope of the waiver precludes the Petitioner from collaterally
12 attacking his sentence in Grounds Two, Four, Five, and Six. Additionally,
13 Petitioner failed to assert his claims on direct appeal, and has not demonstrated that
14 this failure is excused.

15 The Motion to Vacate, Set Aside, or Correct Sentence is therefore **DENIED**.

16
17 Dated: November 12, 2013


18 HON. ROGER T. BENITEZ
United States District Judge

19
20
21
22
23
24
25
26
27
28